FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

November 6, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-104
Petitioner	:	A.C. No. 15-02709-128890-02
	:	
v.	:	Docket No. KENT 2008-106
	:	A.C. No. 15-02709-128890-04
HIGHLAND MINING CO., LLC,	:	
Respondent	:	Mine: Highland 9

DECISION

Appearances: Jennifer Booth, Esq., and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner; Michael Cimino, Esq, Jackson Kelly, PLLC, Charleston, West Virginia, and Eric Walker, Esq., Waverly, Kentucky, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the “Act,” charging Highland Mining Company, LLC, (Highland) with 28 violations of mandatory standards and proposing civil penalties of $74,232.00 for the violations. The general issue before me is whether Highland violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings held September 17, 2008, in Evansville, Indiana, the parties advised that all but three of the charging documents at issue had been settled. A motion confirming that settlement was filed post-hearing. Considering the representations and documentation submitted respect with that settlement, I am able to conclude that the proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act. That settlement will be incorporated in this decision. The three citations remaining at issue are addressed below.

Citation Number 6692779

This citation, issued August 14, 2007, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400, and charges as follows:

> The Getman Construction Tractor, Co. No. 09 had accumulations of oil on the engine due to the valve cover gaskets leaking. At the time of discovery, the Getman tractor had overheated and shut off.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

At hearings, Highland acknowledged the violation as charged and challenged only the Secretary's "significant and substantial" and gravity findings and the amount of her proposed civil penalty. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation, (3) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Since the Secretary has also claimed in these cases that the violations are also "significant and substantial" because of certain alleged health hazards it is necessary to further evaluate those claims in light of additional Commission precedent. In this regard the Commission, in *Secretary v. Consolidation Coal Company*, 8 FMSHRC 890, 897 (June 1986), aff'd 824 F.2d 1071 (D.C. Cir. 1987), applied the *Mathies* test to a violation of a mandatory health standard. Consolidation

Coal Company had received a citation for a violation of 30 C.F.R. § 70.100 (a) which requires that the average concentration of respirable dust in the mine atmosphere during each shift to which a miner is exposed be maintained at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device. In that case sampling results showed that miners had been exposed to an average dust concentration of 4.1 milligrams per cubic meter of air. The Commission held that the violation was "significant and substantial" concluding that any exposure above the 2.0 milligrams per cubic meter designated occupational sampling would satisfy the second element of the *Mathies* "significant and substantial" test and that therefore the violation posed a measure of danger to health. The Commission also found that there was a reasonable likelihood that the health hazard contributed to would result in an illness *Id*. 899. The Commission recognized that the development and progress of respiratory diseases are due to the cumulative doses of dust a miner inhales, and that proof of a single incident of overexposure does not, by itself, conclusively establish a reasonable likelihood that respirable dust will result. *Id.* 898. The Commission recognized that, although overexposure to respirable dust clearly can result in chronic bronchitis and preunocomosis, the effect of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms, and that assessing the precise contribution that a particular overexposure will make to the development of respiratory disease is not possible.

Because of these considerations, the Commission stated that "[g]iven the nature of the health hazard at issue, the potentially devastating consequences for affected miners, and the strong concern expressed by Congress for eliminating respiratory illnesses in miners, we hold that if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the "significant and substantial" test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been established *Id.* at 899.

The fourth element of the "significant and substantial" test i.e., whether a reasonable likelihood that the illness in question will be of a reasonably serious nature, was not seriously disputed. The Commission in the *Consolidation Coal (Consol)* case held that when the Secretary proves that an overexposure in violation of 30 C.F.R. § 70.100(a), based upon designated occupation samples, a presumption arises that the violation is "significant and substantial". Significantly, however, the Commission also held that the operator may rebut this presumption by establishing that miners in the designated occupation were not exposed to the hazard presented by the excessive concentration of respirable dust.

Anthony Fazzolare, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA), and an experienced underground coal miner and mechanic, testified that on August 14, 2007, during an inspection of the subject mine, he found the cited tractor shut down with an accumulation of motor oil on the engine. According to Fazzolare, the oil came from leakage in the valve cover gasket. There is no dispute that there was oil leakage and that the cited tractor overheated and had shut down.

Fazzolare testified, in support of his "significant and substantial" findings, that he was "concerned that the oil was going to ignite due to the fact that the engine had overheated" (Tr. 20). He further testified that he "thought" that the vehicle operator would suffer a "lost time injury because oil has been proven to be a cancer causing agent. If he's breathing oil fumes - - oil smoke in his lungs" (Tr. 20-21).

On cross examination, the inspector acknowledged that although the cited tractor had shut down from overheating, the oil did not ignite, burn or smoke. He further acknowledged that he did not measure the amount of oil or the temperature of that oil or the temperature of the engine. He testified, and it is undisputed, that the engine had an automatic shut down device triggered at a certain temperature and that he had no knowledge of any defect in that device.

James Allen, Highland's Mine Safety Manager with more than 35 years of underground mining experience, testified, without contradiction, that the cited tractor uses Conoco 10W30 motor oil which has a flash point (ignition temperature) of 383 degrees Fahrenheit (See Exhibit R-1). Allen also checked the temperature of the engine block at various points after the tractor had pulled a supply train and found the highest temperature to be 150 degrees Fahrenheit. He further observed that the tractor was equipped with a Murphy high-temperature-heat-sensor-shut-off switch which cannot be set at temperatures above 250 degrees Fahrenheit. It is not disputed that if the Murphy sensor is broken or removed, the engine will not operate.

Highland safety department employee, Tommy Watkins, accompanied Inspector Fazzolare on the subject inspection. He too observed a couple of streams of oil leaking from the engine and noted that the oil had poured into a tray below the engine. He also noted that the oil was not smoking or on fire and that the engine had shut down from overheating. Watkins also observed that the subject tractor was equipped with a dry chemical fire suppression system.

Based on this essentially undisputed evidence it is clear that there was no reasonable likelihood that the cited oil could have been ignited. Inspector Fazzalore identified heat from the tractor's engine as the sole ignition source that could potentially ignite the oil. The undisputed evidence establishes however that the engine oil used in the subject tractor had a minimum flash point or ignition temperature of 383 degrees Fahrenheit. The additional undisputed evidence establishes that the cited tractor had a heat sensor shutdown switch which monitors the temperature of the engine block, and which has a maximum setting of 250 degrees Fahrenheit. Furthermore, if the switch is disconnected or not functioning, the engine will not run. Thus it is not likely that the cited engine oil could reach its ignition temperature. It is further noted that the cited tractor had a functioning dry chemical fire suppression system which would be triggered in the event of any fire on the tractor.

I further find that even assuming, *arguendo*, that the oil could ignite, the Secretary has failed to sustain her burden of proving that anyone was exposed to smoke. In the *Consol* case the Commission required actual exposure to violative amounts of respirable coal dust in order to create a "significant and substantial" violation. Moreover the Secretary failed to prove that even

future exposure of the vehicle operator to smoke from an ignition of oil would inflict him with cancer. Inspector Fazzalore's bare assertion that "oil has been proven to be a cancer causing agent" is simply not sufficient in this regard. He is admittedly not a medical expert (Tr. 15) and even if he was, a bare assertion resting solely on the authority of even an expert is insufficient. See *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997).

Under the circumstances I find the violation to also be of low to moderate gravity.

Citation Number 6695241

This citation also alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

> The operator has allowed hydraulic oil to accumulate in the Stamler Feeder, Co. No. 01, located in MMU 061-0, 7th Panel North off of the Main West Panel. The oil was located under and near the Dodge Coupling. The feeder was running at the time of discovery.

As with the prior citation, Highland does not dispute the violation and challenges only the "significant and substantial" and gravity findings and the amount of the proposed civil penalties. According to Inspector Fazzolare, during his inspection of the subject mine on August 14, 2007, there were accumulations of hydraulic oil under and near the Dodge Coupling on the Number 1 Stamler Feeder. There is no dispute that the feeder was operating at the time of this inspection and that the Dodge Coupling was the heat source of concern. The inspector's testimony that the violation was "significant and substantial" is that he "was concerned with heat building up in [the Dodge Coupling] due to the movement of the two rotating shafts and the low reduced air flow in that area" (Tr. 65). He was, more particularly, concerned with smoke inhalation by the ram car operator if the oil was to ignite (Tr. 65).

Under cross examination, Fazzolare testified that he was concerned about the possible combustion of the hydraulic oil. He acknowledged, however, that he did not measure the amount of hydraulic oil present, he could not estimate how far the oil was located below the Dodge Coupling and that he did not measure the temperature of the oil, the feeder or the Dodge Coupling. Indeed the inspector did not even determine whether the feeder was "hot" to the touch. He further admitted that he did not know whether the oil was anywhere near its ignition temperature.

Highland's safety manager, James Allen, testified without contradiction that the cited feeder utilizes Conoco 320 gear oil (a hydraulic oil) which has a flash point at 450 degrees Fahrenheit and "typically" a flash point of 490 degrees Fahrenheit (Exhibit R-2, page 4). Allen measured the temperature of the cited feeder on September 10, 2008, after it had been operating for about three hours and found a maximum temperature of 169 degrees Fahrenheit 15 feet from the location of the oil. He took four readings at the Dodge Coupling ranging from 73 degrees Fahrenheit to 110 degrees Fahrenheit. He testified without contradiction that the plate on which

the oil was found was located some 14 to 18 inches below the coupling.

Highland employee Tommy Watkins accompanied Fazzolare on his inspection. He noted that the cited feeder had been operating for about 2 ½ hours by the time the citation was issued and that it was not hot. He testified that the only oil he observed lay on the clay mine bottom three feet below the feeder. The oil was not hot, smoking or on fire.

Considering, in particular, the location of the hydraulic oil some14 to 18 inches below the heat-generating Dodge Coupling, the ignition temperature of hydraulic oil and the temperature of the Dodge Coupling (well below that of the ignition point of the hydraulic oil), I do not find that the Secretary has met her burden of proving that the violation was "significant and substantial" or of high gravity.

Citation Number 6695248

The captioned citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.325(f)(3) and charges as follows:

> The operator failed to provide the quantity of air, 3500 cfm, required by the engine approval plate #07-ENA05001 on the Wallace Lube truck located at cross-cut #158 on the Main West supply road. No movement was noticeable using a chemical smoke tube.

The cited standard provides as follows:

> The minimum ventilating air quantity for an individual unit of diesel-powered equipment being operating shall be at least that specified on the approval plate for that equipment. Such air quantity shall be maintained-... (3) in any entry where the equipment is being operated out-by the section loading point and areas of the mine developed on or after April 25, 1997.

The violation charged herein is undisputed. Highland challenges only the "significant and substantial" and gravity findings and the amount of proposed civil penalty. It is undisputed that the required ventilation of 3,500 cubic feet per minute of ventilating air was not present at the cited Wallace Lube Truck when found at cross-cut number 158 on the main west supply road and that Inspector Fazzolare was unable to detect any air movement with his anemometer or by the release of chemical smoke.

Fazzolare based his "significant and substantial" findings on the lube truck operator's potential exposure to diesel "particulate" material emanating from the lube truck exhaust system. He identified the hazardous "particulates" as carbon monoxide (CO) and nitrogen dioxide (NO_2) gases. Fazzolare testified in this regard as follows:

"[d]ue to the reports that I've read indicates [sic] that the diesel particulates have been

determined to be cancer causing agents" (Tr. 117).

As previously noted, however, the Secretary concedes that Fazzalore is not a medical expert qualified to render such an opinion (Tr. 116). In addition, although he had with him a "spotter" used for the detection of these and other gases he detected no carbon monoxide or nitrogen dioxide in the surrounding atmosphere.

In defense, Highland cites the daily reports of its Wallace diesel trucks on the day of the citation and for the two preceding days. i.e. August 20 through August 22, 2007. These reports show no emissions above the stipulated MSHA established threshold limits of 25 parts per million of carbon monoxide or three parts per million of nitrogen dioxide.

In asserting that the violation was "significant and substantial" and of high gravity, the Secretary argues that the potential emissions of carbon monoxide and nitrogen dioxide from the cited diesel lube truck are comparable to the existence of the violative respirable coal dust found in the *Consol* case. The instant case can be clearly distinguished from the *Consol* case, however, in that no carbon monoxide or nitrogen dioxide, the purported cancer causing agents, were detected herein. Moreover, based upon the undisputed records of the Wallace diesel trucks, none were, in any event, emitting carbon monoxide or nitrogen dioxide above the threshold limit values established by MSHA. The Secretary has failed to establish in this case that any violative emissions were present at the time the citation was issued. Accordingly the violation charged herein was neither "significant and substantial" nor of high gravity.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the subject mine is a large mine and has a significant history of violations. There is no dispute that the violative conditions herein were abated in a timely manner and there is no evidence that the penalties imposed herein would affect the operators ability to continue in business. The reduced gravity findings have previously been discussed and the moderate negligence findings have not been challenged by the operator. Under the circumstances, I find that penalties of $300.00 for the violation found in Citation Number 6692779, $300.00 for the violation found in Citation Number 695241 and $200.00 for the violation found in Citation Number 6695248, are appropriate.

ORDER

Citation numbers 6692779, 6695241 and 6695248 are affirmed without "significant and substantial" findings. Considering the penalties assessed for the three violations at issue herein in conjunction with the amount approved in settlement of the remaining violations at issue herein, it is hereby ordered that Respondent pay penalties of $25,376.00 within 40 days of the date of this order.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

Jennifer D. Booth, Esq., U.S. Department of Labor, Mine Safety and Health Admin, 618 Church Street, Suite 230, Nashville, TN 37219

Michael T. Cimino, Esq., Jackson Kelly PLLC, 1600 Laidley Tower, P.O. Box 553, Charleston, WV 25322

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